Supreme Court of the United States

No. 475 October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

Application of Commerce Clause to consumers' sales tax on sales in New York City of coal shipped from sources of supply outside the State. Error of holding that tax is invalid where non-discriminatory, and possibility of multiple taxation is absent. Error of holding that coal purchases made in the city are in interstate commerce merely because seller for its own convenience, chooses to ship from outside the State. Holding of court below (1) discriminates against local business by giving unfair competitive advantage to sellers storing coal outside the State; and (2) seriously diminishes local tax revenues by creating extensive immunities and fostering tax avoidance and evasion. Conflict between decisions of State courts.

October 17, 1939.

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

MILTON SANDBERG,
of Counsel.

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Supreme Court of the United States

No. . October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK.

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, respectfully shows:

1. Your petitioner is the Comptroller of the City of New York, charged by law with the duty of enforcing the tax laws here involved. In conformity with the law in New York, your petitioner was duly substituted, prior to the decision of the Court of Appeals sought to be reviewed, in place and stead of Frank J. Taylor, the former Comptroller, who made the original determination of tax liability against the taxpayer. The petition seeks review of a decision of the Court of Appeals of the State of New York (Judge FINCH dissenting), holding that by virtue of the Commerce Clause, the New York City sales tax could not be imposed upon respondent's sales of coal to New York City purchasers for consumption. The federal question was, and the Court so stated in its remittitur, the sole question involved in its decision.

2. The present case is a companion case to *Matter of A. H. DuGrenier, Inc.* v. *McGoldrick*, 281 N. Y., mem. p. 32

(1939), decided on the same date, where the tax was likewise invalidated. A petition for certiorari in that case is being presented together with the present petition.

3. This case involves the same question as is involved in *McGoldrick* v. *Compagnie Generale Transatlantique*, 307 U. S. ..... (June 5, 1939), and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 307 U. S. ..... (June 5, 1939), in which writs of certiorari were granted by this Court on the application of this petitioner, and which are now Nos. 44 and 45 respectively on the current docket of this Court. On October 9, 1939, the Court granted the request of the City that the hearing of those cases be deferred until December 4 or such time as the petitions for certiorari in this case and the companion *DuGrenier* case shall have been acted upon.

Jurisdiction and Timeliness.

4. The petition for certiorari is made under 28 U. S. C. A., § 344, subd. (b); the Court has jurisdiction to grant the writ. *Minnesota* v. *Blasius*, 290 U. S. 1 (1933); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346 (1939); *McGoldrick* v. *Compagnie Generale Transatlantique* and *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, both *supra*.

5. A final order and judgment were entered in the office of the County Clerk of New York County, on June 24, 1939, upon the remittitur of the Court of Appeals filed on June 23, 1939, and upon the order of the Supreme Court of the State of New York, dated June 23, 1939, making the order and judgment of the Court of Appeals the order of the Supreme Court. Thereafter, by order of Mr. Justice Reed, dated September 7, 1939, the petitioner's time to petition this Court for certiorari was extended for a period of thirty days from September 24, 1939. On September 25, 1939,

petitioner duly filed with the Court of Appeals a motion for reargument and to amend the remittitur. On September 27, 1939, the Court of Appeals denied the motion for reargument but granted the motion to amend the remittitur. 281 N. Y., mem. p. 94. On October 11, 1939, an order was entered in the office of the County Clerk of New York County, making the order of the Court of Appeals dated September 27, 1939, the order of the Supreme Court of the State of New York. The petition is timely, either by virtue of Mr. Justice REED's order of extension, or because of the decision on the motion for reargument, the amendment of the remittitur on September 27, 1939, and the resultant necessity of entering a new order in the Court where the record lies.

6. The decision of the Court of Appeals was based solely upon the ground that the tax as applied violated the Commerce Clause of the Federal Constitution. This ground of objection was raised by the taxpayer (respondent here) at the hearing before the petitioner to review petitioner's preliminary determination of tax liability (R. 40-140). Thereafter, it was again raised in the proceeding brought in the Appellate Division under Article 78 of the Civil Practice Act of the State of New York (R. 16). The Appellate Division sustained the objection and annulled petitioner's determination (R. 203). Upon appeal to the Court of Appeals the taxpayer further urged this objection. The remittitur, as amended, provides that the order of the Appellate Division appealed from was affirmed,

> "upon the sole ground that the City Sales Tax Law as here applied violates the Commerce Clause (Art. I, Sec. 8, cl. 3) of the Constitution of the United States." (281 N. Y., mem. p. 94.)

The Statute the Validity of Which Is Involved.

7. The statute the constitutionality of which is involved is the New York City sales tax law, Local Law No. 20 of 1934 (officially printed at p. 143 of the Local Laws of the Cities of the State for 1934 as No. 21), as amended by Local Law No. 24 of 1934 (officially printed at p. 164 of Local Laws of the Cities of the State for 1934 as No. 25), all enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, p. 1805. These local laws, and the enabling act authorizing them, have been and continue to be renewed annually. The provisions of the local law are printed as Appendix A, the provisions of the state enabling act, as Appendix B.

Opinions Below.

8. The decision of the Court of Appeals is reported in 281 N. Y., mem. p. 34, the memorandum opinion of the Appellate Division is reported in 255 App. Div. 961, and is printed as Appendix C. The decision of the Court of Appeals in the companion *DuGrenier* case is in 281 N. Y., mem. p. 32, which affirmed 255 App. Div. 961.

Summary Statement of the Matter Involved.

9. The City sales tax law in question imposes a non-discriminatory tax of 2% upon every sale of tangible personal property in the City of New York, the tax being paid and borne by the purchaser. A sale is defined as "any transfer of title or possession or both"; a retail sale as, a sale "for any purpose other than for resale". The respondent's sales which were the subject of the tax were made in a manner described more fully in the subjoined

brief. The contracts were made, signed and executed within the City of New York and called for the sale and delivery of coal in New York City. Respondent fulfilled these contracts by shipments from its mines in Pennsylvania.

Questions Presented.

10. The questions presented in this case are as follows:

(a) Does the New York City tax as applied to respondent's sales of coal impose an unconstitutional burden on interstate commerce?

(b) Do respondent's sales of coal "require or necessarily involve transportation across the state boundary" in the sense in which those words were used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174 (1935)?

Assignment of Errors.

11. It is submitted that the Court of Appeals erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the *Wiloil* case, *supra.*

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Reasons for Allowance of the Writ.

12. The reasons relied on by petitioner for allowance of the writ are as follows:

(a) This case involves a slight variation on the question involved in the *Compagnie Générale Transatlantique* and *Felt & Tarrant Mfg. Co.* cases which are now pending before this Court. The same reasons which justified the request for a writ of certiorari in those cases justify the request in this case; and it is a matter of great public importance to the City of New York that this case be heard together with the pending cases.

(b) Petitioner contends that in holding that the City sales tax law as applied to respondent's sales constitutes an unconstitutional burden on interstate commerce the Court of Appeals has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court, which we cite in the subjoined brief; for, the Court has held invalid a type of local consumers' tax which (i) does not discriminate against or otherwise burden interstate commerce, and (ii) is so limited in its operation that there is no possibility of multiple taxation.

(c) Petitioner suggests that in holding that the particular transactions taxed required or necessarily involved interstate commerce, the Court of Appeals has decided a second federal question of substance in a way probably not in accord with applicable decisions of this Court: *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911).

(d) These are test cases. A great many proceedings are pending which await their final outcome. Large numbers

of purchasers and sellers and sums of money running into millions of dollars annually are involved. In New York City, in particular, a huge business is done every year in a manner similar to that here described, for a large number of purchasers in the City of New York place orders which, by reason of the seller's own choice or convenience, are filled from out-of-state sources.

(e) The decision of the Court of Appeals unduly limits the taxing powers of the States, and does so in such a way as to give industries a motive for moving their plants or warehouses out of the State while maintaining selling offices within the State. By thus causing a loss of wealth and employment to the State, it will bring about a shrinkage of revenue from other taxes.

The Commerce Clause should not be twisted into a device to prejudice local vendors by subjecting them to unjustifiable competitive disadvantage in their appeal to the same local market. A considerable number of states and localities are imposing consumers' taxes like the New York City sales tax here involved, and are undoubtedly confronted with precisely the same question under the Commerce Clause.

(f) The decision of the Court of Appeals that respondent's sales taxed are in interstate commerce, conflicts with the decision of the highest court of the State of West Virginia where a similar question was raised and decided. *Lewis* v. *City of Bluefield*, 117 W. Va. 782, 188 S. E. 237 (1936).

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York,

in and for the County of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed and determined in this Court, as provided in 28 U. S. C. A., § 344, subd. (b); and that the final order and judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and laws of the United States; and that the said final order and judgment may be reversed and petitioner's original determination of tax liability on the part of the respondent confirmed; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated: New York, N. Y., October 17, 1939.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,
Petitioner,

By SOL CHARLES LEVINE,
Counsel for Petitioner,
Municipal Building,
Borough of Manhattan,
City of New York.

Supreme Court of the United States

No. . October Term, 1939

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,

Petitioner,

against

BERWIND-WHITE COAL MINING COMPANY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

The respondent is a Pennsylvania corporation engaged in the marketing and distribution of bituminous coal (R. 42). It is both a mine owner and an agent for mine owners, and it distributes and markets coal from its own mines in Pennsylvania, and from the mines of others in West Virginia (R. 42, 43, 137).

The only question which arises here is as to sales to New York City consumers of coal drawn by the company from its own mines in Pennsylvania and delivered in New York City. The company also makes sales for resale to New York City wholesalers which are exempt under the local law (R. 43). The resales which follow such sales are undeniably taxable (*ibid.*).

Although the company's sources of supply are in Pennsylvania and West Virginia, it has established its financial

and sales headquarters in New York City (R. 130). Its president and two out of its three vice-presidents are permanently stationed there (R. 131). Its foreign and bunkering departments, its general sales department, a research division, and an accounting department for foreign as well as domestic business are all maintained in offices in New York City (R. 130).

However, the company has never acquired storage facilities within the City (R. 45). Instead, it fulfills its contract by shipping directly to the customer from the mines. It is on this lack of storage space and the resulting delivery technique that the company chiefly relies for its claim that its sales are immune from tax.

The company's New York sales during the period in question (December 10, 1934 to December 31, 1935) aggregated $7,537,940.09. Of this amount 96%, or a total of $7,239,879.36 represented purchases by local public utilities, as follows:

Brooklyn Edison Co.	$2,467,164.83
New York Edison Co. and United Electric Light & Power Co.	2,038,109.29
Interborough Rapid Transit Co.	2,038,204.28
Williamsburg Power Plant Corp.	696,400.96
Total	$7,239,879.36

The other 4% of the company's sales amounting to $298,160.73 was divided among 15 steamship and industrial companies (Taxpayer's Exhibit 4, R. 142).

All of the Company's contracts, whether spot or term, were negotiated, executed and signed by all parties within the City of New York (R. 101). In no case did the accep-

tance occur in Pennsylvania or at any other point outside the City of New York (*ibid.*).

The coal involved was of two grades: B-Seam and C-Prime Seam (R. 42). These names express differences in heat value and chemical composition (R. 43). Other companies produce these kinds of coal (R. 135-137). B-Seam is mined throughout an area of 150 square miles in Pennsylvania (R. 136). There is no evidence as to the extent of the area in which C-Prime Seam is mined.

All orders for coal are placed in the executive offices in New York City and transmitted by them to Pennsylvania (R. 85). Delivery is then made in this way. The coal is loaded at the mines and carried over the tracks of the Pennsylvania Railroad to Hersimus Pier, Jersey City (R. 86). The consignee is not the buyer but the Berwind-White Coal Co. (R. 86). At Jersey City, the coal is dumped into the company's barges and shipped to the customers' plants on the river front or alongside ships (R. 140, 86-88).

The company concedes that both title to and possession of the coal pass to the buyers in New York City, and that the company fully controls and directs deliveries. Payments are made in New York City at the company's executive offices (R. 101). Where there is "sampling"—a process of comparing shipments with specifications—it is always carried on entirely within the City (R. 133-135).

The City sales tax imposed upon these sales is a general non-discriminatory tax of 2% upon every "transfer of title or possession" in the City of New York, of tangible personal property purchased for use rather than for resale. The tax is paid by the purchaser. It is ordinarily collected by the vendor, but if not, is payable by the purchaser directly to the petitioner as City Comptroller. The tax is not imposed where goods, although purchased in New

York City, are delivered to consumers outside the City. Article 94 of the Comptroller's Regulations; *Matter of C. G. Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). No license is required of either purchaser or vendor as a condition of making the sale.

Jurisdictional Statement and Assignment of Errors.

The Court will find these at pages 2 and 5 of the petition *supra* respectively.

Preliminary Statement.

The sole question involved in this case and the companion *DuGrenier* case is the validity of the New York City mandatory consumers' sales tax as applied to goods shipped into the state from a point outside the state. This Court has already consented to pass on this question by granting writs of certiorari in *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 307 U. S. (June 5, 1939), and *McGoldrick* v. *Compagnie Générale Transatlantique*, 307 U. S. (June 5, 1939), which are now pending on the current docket of this Court. On October 9, 1939, the Court granted the request of the City that the hearing of those cases be deferred until December 4, 1939 or such time as the petitions for certiorari in this case and the companion *DuGrenier* case shall have been acted upon. These two cases in which writs of certiorari are now requested involve factual situations which are substantially similar to those now before the Court. If these petitions for writs of certiorari are denied the City may be in the position of prevailing over the Compagnie Generale Transatlantique and the Felt & Tarrant Company in this Court, yet left without redress against these two similarly situated taxpayers.

POINT I.

The New York City sales tax, as applied to the respondent's sales, does not impose an unconstitutional burden on interstate commerce.

The question is whether the tax as applied to respondent's sales imposes a direct and immediate burden on interstate commerce. Such burden, to be the basis for invalidation, would have to be actual and not merely theoretical. The main types of applicable situations in which an unconstitutional burden has been found to be present were recently summarized in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939). It is settled by that and other leading cases on the subject that where a tax is non-discriminatory, and where it does not impose unwarranted licensing requirements, it will be upheld provided there is no possibility of multiple taxation. *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Coverdale* v. *Arkansas-Louisiana Pipeline Co.*, 303 U. S. 604 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

Measured by these standards, the tax at bar is clearly valid:

There is no undue burden on interstate commerce.

1. Purchasers from foreign vendors are required to pay the same tax as purchasers from local vendors, and no more. Foreign vendors are placed under the same obligation with respect to collecting the tax as local vendors. Foreign products are not discriminated against. On the other hand, local vendors, local products and local business would be discriminated against were the tax at bar held valid.

2. Interstate commerce is not interfered with by the imposition of unwarranted licensing requirements, conditions precedent to interstate selling, and the like. No license is required of purchasers or vendors. If the purchaser omits to pay the tax, he is not forbidden to make the purchase; the purchase takes place just the same.

3. In the case at bar there is no possibility of multiple taxation. The tax is not one on the gross receipts of a vendor imposed by the vendor's State; it is on the purchase of a local consumer. The tax is upon the purely local acquisition of property in the local market.

With respect to analogous taxes on consumers, the Court has already held that the state in which the consumer is may tax him. Thus, it has sustained the following consumers' taxes imposed by the buyer's state, viz.: a motor fuel (sales) tax (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1933]); a use (sales) tax (*Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 [1934]); a "receiving (sales) tax (*J. Bacon & Sons* v. *Martin*, 303 U. S. 380 [1939]); or a property (sales) tax (*Hinson* v. *Lott*, 8 Wall. 148 [1868]). On the other hand, the Court has barred similar taxes imposed by the seller's state (*J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 [1938]; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 [1939]). Since the tax on the sales at bar is imposed on the purchaser, by the *purchaser's* State and the tax could not be imposed on the same sales by the *seller's* State, there is no possibility of double or multiple taxation.

Since there is no possibility of multiple taxation, there is no necessity for allocation, assuming allocation to be administratively feasible in respect of a tax on a purchaser-consumer. The fact that multiple taxation is not possible itself results in a species of allocation: New York City

taxes New York City purchasers on their purchases in that City, and Pennsylvania taxes Pennsylvania purchasers on their purchases there. Pennsylvania could not claim the right to tax the purchasers of coal on their acquisition of property in New York City, any more than New York City could tax a Pennsylvania purchaser on his acquisition of property in Pennsylvania. The doctrine of territoriality as well as that of multiple taxation would forbid such a result.

4. The decisions of this Court have never gone so far as to say that a company doing some interstate business may not, when it enters a foreign state, be compelled to assume the burden, borne by domestic sellers, of collecting from its customers and transmitting to the authorities a sales tax imposed upon such customers by local law. *Cf. Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939). Otherwise, foreign vendors would obtain unjustifiable advantages over local competitors who are required to collect the 2% tax. Business would be encouraged to flee the taxing state and seek a point of vantage in neighboring states from which to make the identical sales free of tax. Thus, new forms of tax avoidance and evasion would be fostered.

Comparable taxes have always been upheld.

So far as we are aware, this case, and the two cases in which this Court granted certiorari on June 5, 1939, are the first cases presented to this Court in which it has been urged that a retail sales tax levied upon a purchaser-consumer imposes an invalid burden on interstate commerce. This Court has never held such a tax upon the purchaser invalid.

Moreover, so far as we know, this Court has never held invalid a tax imposed by the buyer's state upon interstate sales measured by the value or volume of the sales. See

Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harvard Law Review 617, 629 (1939).

In every case where this Court has had before it a tax to which the City sales tax is at all comparable, it has upheld the tax against attack based upon the Commerce Clause. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939); *Southern Pacific Company* v. *Gallagher*, 306 U. S. 167 (1939); *Pacific Telephone & Telegraph Co.* v. *Gallagher*, 306 U. S. 182 (1939); *J. Bacon & Sons* v. *Martin*, 305 U. S. 380 (1939); *Western Live Stock* v. *Bureau*, 303 U. S. 250 (1938); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937); *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935); *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86 (1934); *Edelman* v. *Boeing Air Transp.*, 289 U. S. 249 (1933); *Nashville, C. & St. L. Railway Co.* v. *Wallace*, 288 U. S. 249 (1933); *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932); *Banker Brothers* v. *Pennsylvania*, 222 U. S. 210 (1911); *Woodruff* v. *Parham*, 8 Wall. 123 (1868); *Hinson* v. *Lott*, 8 Wall. 148 (1868).

The above are all instances of non-discriminatory local taxes applied to transactions connected with interstate commerce. In all of them the burden of the tax fell on the local purchaser-consumer. In almost all, it may be added, the tax was measured by the value or volume of the sales. The New York City sales tax is not distinguishable in any material particular from most of the taxes upheld in the cases cited above.

The New York City sales tax is, moreover, *identical* in substance with the California tax (Cal. Laws of 1935, ch. 361, as amended by Cal. Laws of 1937, chs. 401, 671 and 683) sustained in *Felt & Tarrant Mfg. Co.* v. *Gallagher*, *supra*, as the following tabular comparison plainly shows:

California Tax.	*New York City Tax.*
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The tax is collected by the vendor, who files the returns.	4. The tax is collected by the vendor, who files the returns.
5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	5. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.	6. The tax law requires the vendor to insure payment of the tax if it fails to make collections from the tax debtors.
7. The tax is on a local event *i. e.*, "the exercise of right or power * * * incident to the ownership of that property" other than resale.	7. The tax is on a local event, *i. e.*, the "transfer of title or possession or both" for any purpose other than resale.

The fact that the California tax is termed a "use" tax and the New York City tax a "sales" tax is a difference in words, not a difference in substance. For, "use" as defined in the California statute (see paragraph 7 in the tabular comparison above), includes every acquisition of possession and so, every sale. A mere difference in name between two taxes which are substantially the same does not justify

varying constitutional treatment. As stated by this Court in *Southern Pacific Company* v. *Gallagher, supra,* 306 U. S., at page 177:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

It thus appears that in invalidating the City sales tax in the case at bar, the Court of Appeals has decided the case in a way probably not in accord with applicable decisions of this Court.

POINT II.

Respondent's sales do not require or necessarily involve interstate shipment, as that phrase is used in *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 174.

In holding that respondent's sales required or necessarily involved interstate shipment, we submit, the Court misapprehended the decisions of this Court in *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169 (1935), and *Banker Brothers* v. *Pennsylvania,* 222 U. S. 210 (1911).

In the *Wiloil* case, *supra,* as in the case at bar, the sale was made in the buyer's State, called for delivery of the merchandise in that jurisdiction, and related to standard goods. Despite the fact that the contracts called for delivery in Pennsylvania of oil "f.o.b. Wilmington, Delaware," this Court concluded that the contracts did not require or necessarily involve interstate shipment, stating, in language precisely applicable at bar (294 U. S., at p. 173):

> "Appellant was not required by the contracts to obtain the fuels at Wilmington but was free to effect

performance by shipping from any place within or without Pennsylvania."

And further (p. 174):

> "There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought in from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. *Woodruff* v. *Parham* 8 Wall. 123, 137. *The limitation appellant puts on § 4 would operate to the extent of three cents a gallon in favor of liquid fuels delivered as in this case, from a place in another State, against those delivered in Pennsylvania from sources in that Commonwealth over routes wholly therein.*" (Italics ours.)

The Court indicated in a general way that the tax was upon the local sales. It pointed out, moreover, that the fact that the entire movement of the oil from Delaware into Pennsylvania involved interstate commerce—which would have been material had federal regulation been involved—was not pertinent when the inquiry was directed to state taxation of local sales (p. 175).

Finally, the Court summarized the transaction involved and the effect of the tax imposed upon it, as follows (p. 175):

> "As interstate transportation was not required or contemplated, it may be deemed as merely incidental. Cf. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 604. *Ware & Leland* v. *Mobile County*, 209 U. S. 405, 412-413. The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, it is indirect and pre-

cisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation from Pennsylvania sources."

Conclusion.

The Commerce Clause does not require that in an effort to avoid undue burdens on interstate commerce, sales made within the State, under contracts made there, of goods shipped in (for the seller's convenience and economy) from outside the State, be exempted from a general consumers' sales tax. Such a tax, paid as it is by the consumer and measured by the volume of sales, is not duplicated in any other State, for the act taxed—the final passage of possession and title to the consumer—can occur in but one State. Local merchants must be protected against unjustifiable discrimination in favor of foreign vendors. The States must be protected against the serious impairment of their revenue powers by the encouragement of tax avoidance and evasion. Respondent's purchasers obtain the protection of the laws of New York for their purchases there and should not be permitted to escape the common burden of all purchasers in the local market.

The petition for certiorari should be granted.

Dated: New York, N. Y., October 17, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
PAXTON BLAIR,
SOL CHARLES LEVINE,
Counsel for Petitioner.

MILTON SANDBERG,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1934.

No. 24

A local law to amend local law number twenty of the year nineteen hundred and thirty-four to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and rendering of certain services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief.

Became a law December 28, 1934, with the approval of the Mayor. Passed on message of necessity by the local legislative body of the city of New York.

Be it enacted by the municipal assembly of the city of New York as follows:

Section 1. Local law number twenty of the local laws of the city of New York for the year nineteen hundred and thirty-four, entitled "A local law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing a tax upon receipts from sales of certain properties and services in the city of New York, to enable such city to defray the cost of granting unemployment work and home relief," is hereby amended so as to read as follows:

TAX ON SALES OF CERTAIN PROPERTIES AND RENDERING OF CERTAIN SERVICES IN THE CITY OF NEW YORK:

Section 1. Definitions.
2. Imposition of tax.

3. Collection of tax from purchaser.
4. Records to be kept.
5. Returns.
6. Payment of taxes.
7. Determination of tax by the comptroller.
8. Proceedings to recover tax.
9. Notices and limitations of time.
10. Refunds.
11. General powers of the comptroller.
12. Administration of oaths and compelling testimony.
13. Reference to tax.
14. Registration.
15. Penalties.
16. Returns to be secret.
17. Disposition of revenues.
18. Application; construction.

Section 1. **Definitions.** When used in this local law:

(a) The word "person" includes an individual, co-partnership, society, association, joint stock company, corporation, estate, receiver, trustee or any other person acting in a fiduciary capacity, and any combination of individuals;

(b) The word "vendor" means a person selling property or rendering services upon the receipts from which a tax is imposed under section 2 of this local law;

(c) The word "purchaser" means a person who purchases property or to whom are rendered services, receipts from which are taxable under section 2 of this local law;

(d) The word "receipt" means the amount of the sale price of any property or the charge for any service specified in section 2 of this local law, valued in money, whether re-

ceived in money or otherwise, including all receipts, cash, credits and property of any kind or nature (other than the credit allowed for property of the same kind accepted in part payment and intended for resale), and also any amount for which credit is allowed by the vendor to the purchaser, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever;

(e) The word "sale" or "selling" means any transfer of title or possession or both, exchange or barter, license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, and may include the rendering of any service specified in section 2 of this local law;

(f) The words "tangible personal property" mean corporeal personal property;

(g) A "retail sale" or "sale at retail" means a sale to a customer, or to any person for any purpose other than for resale in the form of tangible personal property;

(h) The word "semi-public" means those charitable and religious institutions which are supported wholly or in part by public subscriptions or endowment and are not organized or operated for profit;

(i) The word "return" includes any amended return filed or required to be filed as herein provided;

(j) The word "comptroller" means the comptroller of the city of New York.

§ 2. **Imposition of tax.** During the period commencing on December tenth, nineteen hundred and thirty-four, and

ending on December thirty-first, nineteen hundred and thirty-five,* there shall be paid a tax of two per centum upon the amount of the receipts from every sale in the city of New York of:

(a) Tangible personal property sold at retail, except those articles described in schedule "A" below;

(b) Gas, electricity, refrigeration and steam, and gas, electric, refrigeration, steam, telephone and telegraph service, for domestic or commercial use;

(c) Food, drink and entertainment in restaurants, cafes and other establishments including in the amount of such receipts any cover or minimum or other charge made to patrons where the charge to the patron is one dollar or more, in which event the tax is imposed on the full amount of the charge to each such patron;

(d) Wines and liquors and other alcoholic beverages, and drinks compounded thereof or therewith, except beer or other similar malt beverages, including sales thereof in restaurants, cafes, bars and other places for consumption on the premises:

SCHEDULE A

Cereals and cereal products;
Milk and milk products;
Meat and meat products;
Fish and fish products;
Eggs and egg products;
Vegetables and vegetable products;
Fruits, spices and salt;

* The local law has been annually renewed and extended and is still in effect.

Appendix A

Sugar and sugar products, other than candy and confectionery;

Coffee and coffee substitutes; beer or other similar malt beverages; tea, cocoa and cocoa products; other than candy and confectionery;

Water, when delivered to the consumer through mains and pipes;

Drugs and medicines sold upon a physician's prescription;

Newspapers and periodicals.

The enumeration in this schedule shall not be deemed to exclude sales of wines and liquors and other alcoholic beverages, soft drinks, and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith (other than coffee, tea and cocoa, beer and other similar malt beverages), nor any food or food products unless sold for human consumption, from the tax imposed by this local law.

Receipts from sales or services by or to the state or city of New York, and receipts from sales or services by or to semi-public institutions, and receipts upon which the state of New York and city of New York are by virtue of the provisions of the constitution of the United States or otherwise without power to impose a tax, shall not be subject to tax hereunder.

Upon each taxable sale or service the tax to be collected shall be stated and charged separately from the sale price or charge for service and shown separately on any record thereof, at the time when the sale is made or evidence of sale issued or employed by the vendor and shall be paid by the purchaser to the vendor, for and on account of the city of New York, and the vendor shall be liable for the collection or the service rendered; and the vendor shall have the same right in respect to collecting the tax from the purchaser, or

in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service and payable at the time of the sale.

Where a purchaser has failed to pay and a vendor has failed to collect a tax upon a sale or service, as imposed by this local law, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the purchaser directly to the comptroller and it shall be the duty of the purchaser to file a return thereof with the comptroller and to pay the tax imposed thereon to the comptroller within fifteen days after such sale was made or service rendered.

The comptroller may, wherever he deems it necessary for the proper enforcement of this local law, provide by regulation that the purchaser shall file returns and pay directly to the comptroller the tax herein imposed, at such times as returns are required to be filed and payment over made by vendors.

The tax imposed by this local law shall be paid upon all sales made and services rendered on and after December tenth, nineteen hundred and thirty-four, although made or rendered under a contract dated prior to December tenth, nineteen hundred and thirty-four. Where a service is billed on either a monthly or other term basis, the bill for such month or other terms shall be a receipt subject to the tax herein imposed, provided that where such bill includes a period prior to December tenth, nineteen hundred and thirty-four, or subsequent to December thirty-first, nineteen hundred and thirty-five,* such bill shall be equitably apportioned. The comptroller may provide by regulation that the tax upon receipts from sales on the installment plan may be

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* See footnote, *ante*, p. 24.

paid on the amount of each installment and upon the date when such installment is due. He shall provide by regulation for the exclusion of amounts representing sales where the contract of sale has been cancelled and/or the property returned and/or the receipt has been ascertained to be worthless, or, in case the tax has been paid upon such receipts, for a credit and/or a refund of the amount of the tax upon such receipts, upon application therefor as provided in section 10.

For the purpose of the proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property and services mentioned in this section are subject to the tax until the contrary is established, and the burden of proving that a receipt is not taxable hereunder shall be upon the vendor or the purchaser, unless the vendor shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser and the number of his registration certificate to the effect that the property or service was purchased for resale.

No person engaged in the business of selling property or services the receipts from which are subject to tax under this local law shall advertise or hold out to the public in any manner directly or indirectly that the tax imposed by this local law is not considered as an element in the price to the purchaser.

§ 3. **Collection of tax from purchaser.** The comptroller shall by regulation prescribe a method or methods and/or a schedule or schedules of the amounts to be collected from purchasers in respect to any receipt upon which a tax is imposed by this local law so as to eliminate fractions of one cent and so that the aggregate collections of taxes by a ven-

dor shall, as far as practicable, equal two percentum of the total receipts from the sales and services of such vendor upon which a tax is imposed by this local law. Such schedule or schedules may provide that no tax need be collected from the purchaser upon receipts below a stated sum, and may be amended from time to time so as to accomplish the purposes herein set forth.

§ 4. **Records to be kept.** Every vendor shall keep records of receipts and of the tax payable thereon, in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period, or may require that they be kept longer.

§ 5. **Returns.** Every vendor shall file with the comptroller a return of his receipts and of the taxes payable thereon for the periods ending February twenty-eighth, May thirty-first, August thirty-first and December thirty-first, nineteen hundred and thirty-five. Such returns shall be filed within thirty days from the expiration of the periods ending February twenty-eighth and May thirty-first and within fifteen days from the expiration of the periods ending August thirty-first and December thirty-first. The comptroller may permit returns to be made by other periods so as to include all receipts during the period from December tenth, nineteen hundred and thirty-four, to December thirty-first, nineteen hundred and thirty-five,* inclusive. If he deems it necessary in order to insure the payment of the tax imposed by this local law the comptroller may require returns of

* See footnote, *ante*, p. 24.

receipts to be made for other than the aforesaid periods and upon such dates as he may specify.

The form of returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this local law. The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice. [*Amended by Local Law No. 23 of 1935.*]

§ 6. **Payment of taxes.** At the time of filing a return of receipts each vendor shall pay to the comptroller the taxes imposed by this local law upon the receipts required to be included in such return. All taxes for the period for which a return is required to be filed shall be due from the vendor and payable to the comptroller on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts and the taxes due thereon. The comptroller may require any vendor required to collect the tax imposed by this local law to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as the comptroller may fix, to secure the payment of any tax and/or penalties due or which may become due from such vendor. In lieu of such bond, securities approved by the comptroller, in such amount as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the comptroller and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and/or penalties due. Upon such sale, the

surplus, if any, above the amounts due under this local law shall be returned to the person who deposited the securities.

§ 7. **Determination of tax by comptroller.** If a return required by this local law is not filed, or if a return when filed is incorrect or insufficient the comptroller shall determine the amount of tax due from such information as he may be able to obtain and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and/or other factors. The comptroller shall give notice of such determination to the person liable for the collection and/or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the vendor or purchaser against whom it is assessed shall be entitled to and within thirty days after the giving of notice of such determination apply to the comptroller for a hearing, or shall cause the same to be reviewed by certiorari, or unless the comptroller of his own motion shall reduce the same. If no opportunity for a hearing shall have been given to such person prior to the determination of the comptroller, such person may within thirty days after the comptroller shall give notice thereof, apply to the comptroller for a hearing. After such hearing the comptroller shall give notice of his determination to the applicant. The determination of the comptroller may be reviewed by certiorari if application is made to the comptroller therefor within thirty days after the giving of notice thereof. Whenever under this local law an order of certiorari is permitted it shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice

of the supreme court of the state of New York shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 8. **Proceeding to recover tax.** Whenever any vendor or purchaser shall fail to collect and pay over any tax and/or to pay any tax or penalty imposed by this local law as in this local law provided, the corporation counsel shall, upon the request of the comptroller, bring an action to enforce the payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the vendor or purchaser which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that pro-

vided by law in respect to executions issued against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner. In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 9. **Notices and limitations of time.** Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this local law or in any application made by him or if no return has been filed or application made then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to limitations of time for the enforcement of a civil remedy shall

not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 10. **Refunds.** The comptroller shall refund any tax erroneously or illegally collected and paid to him if application therefor shall be made within one year from the payment thereof. Such application may be made by the person upon whom such tax was imposed, or by the vendor who collected and paid such tax to the comptroller if such vendor establishes to the satisfaction of the comptroller, under such regulations as he may prescribe, that he has repaid to the purchaser the amount for which application for refund is made. The comptroller may, in lieu of any refund required to be made, allow credit therefor on subsequent payments due from the applicant. Notice of the determination of the comptroller of any application for refund shall be given to the applicant, who shall be entitled to a certiorari order to review such determination, provided application therefor is made within thirty days after the giving of such notice. An order of certiorari shall not be granted hereunder except in accordance with the provisions of section 7.

§ 11. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this local law, he is hereby authorized and empowered:

(a) To make, adopt and amend rules and regulations appropriate to the carrying out of this local law and the purposes thereof;

(b) To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and for cause

shown, to remit penalties and interest; and to compromise disputed claims in connection with the taxes hereby imposed;

(c) To assess, revise, readjust and impose the taxes authorized to be imposed under this local law;

(d) To request information from the tax commission of the state of New York relative to any person; and to afford information to such tax commission relative to any person, any other provision of this local law to the contrary notwithstanding;

(e) To delegate his functions hereunder to a deputy comptroller or other employee or employees of the department of finance of the city of New York;

(f) To prescribe methods for determining the receipts from sales made or services rendered in the city of New York.

§ 12. **Administration of oaths and compelling testimony.** The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this local law, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor, and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided.

§ 13. **Reference to tax.** Wherever reference is made in sales tags or placards or advertisements to this tax, such reference shall be substantially in the following form: "City sales tax for relief of unemployed," except that in any evidence or memorandum of sales issued or employed by the vendor the word "tax" will suffice.

§ 14. **Registration.** On or before January tenth, nineteen hundred and thirty-five, or in the case of vendors commencing business after January seventh, nineteen hundred and thirty-five, or opening new places of business after such date, within three days after such commencement or opening, every vendor required to collect the tax imposed by this local law shall file with the comptroller a certificate of regis-

tration in a form prescribed by the comptroller who shall within five days after such registration issue without charge to each such vendor a certificate of authority empowering such vendor to collect the tax from the purchaser and duplicates thereof for each additional place of business of such vendor. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificates of authority shall be prominently displayed in the places of business of the vendor. A vendor who has no regular place of doing business shall attach such certificate to his cart, stand, truck, or other merchandising device. Such certificates shall be non-assignable and non-transferable and shall be surrendered immediately to the comptroller upon the vendor's ceasing to do business at the place therein named.

A vendor shall refuse to accept a certificate that any property or service upon which a tax is imposed by this local law is purchased for resale and shall collect the tax imposed by this local law unless the purchaser shall have filed a certificate of registration and received a certificate of authority to collect the tax imposed by this local law; provided, however, that the payment of the tax by such purchaser shall not relieve the purchaser of the duty herein imposed upon such purchaser to collect the tax upon any resale made by him; but such purchaser who shall thereafter file a certificate of registration and receive a certificate of authority to collect the tax may, upon application therefor, receive a refund of the taxes paid by him upon property and services thereafter resold by him and upon the receipts from which he shall have collected and paid over to the comptroller the tax herein imposed.

§ 15. **Penalties.** Any person failing to file a return or to pay or pay over any tax to the comptroller within the

time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid and disposed of in the same manner as other revenues from this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any vendor or purchaser and any officer of a corporate vendor or purchaser failing to file a return required by this local law, or filing or causing to be filed or making or causing to be made or giving or causing to be given any return, certificate, affidavit, representation, testimony or statement required or authorized by this local law, which is wilfully false, and any vendor and any officer of a corporate vendor wilfully failing to file a registration certificate or to display or surrender the certificate of authority as required by this local law or assigning or transferring such certificate of authority, and any vendor and any officer of a corporate vendor wilfully failing to charge separately from the sales price the tax herein imposed, or wilfully failing to state such tax separately on any evidence of sale issued or employed by the vendor, or wilfully failing or refusing to collect such tax from the purchaser, and any vendor and any officer of a corporate vendor who shall refer or cause reference to be made to this tax in any sales tag, placard or advertisement in a form other than that required by this local law, shall, in addition to the penalties herein or elsewhere prescribed, be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprison-

ment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law, shall be presumptive evidence thereof.

§ 16. **Returns to be secret.** 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner the receipts or other information relating to the business of a taxpayer contained in any return required under this local law. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the comptroller in an action or proceeding under the provisions of this local law, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel or

other legal representatives of the city, or by the district attorney of any county within the city of New York, of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the city he shall be dismissed from office and be incapable of holding any public office in this city for a period of five years thereafter.

§ 17. **Disposition of revenues.** All revenues and monies resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment including the repayment of monies borrowed or to be borrowed in anticipation of this tax.

§ 18. **Application; construction.** If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances shall not be affected thereby. This local

law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four, pursuant to which it is enacted.

§ 2. **Effective date of local law.** This local law shall take effect immediately.

The City of New York, Office of the City Clerk, ss:

I hereby certify that the foregoing is a true copy of a local law passed by both branches of the Municipal Assembly of The City of New York and approved by the Mayor on December 28, 1934, on file in this office.

MICHAEL J. CRUISE,
City Clerk.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1934

CHAPTER 873.

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five * to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective

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* The powers have been annually extended and have not yet expired.

and ending December thirty-first, nineteen hundred thirty-five,* or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition

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* See footnote, *ante*, p. 41.

of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

STATE OF NEW YORK, DEPARTMENT OF STATE, ss.:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

EDWARD J. FLYNN,
Secretary of State.

APPENDIX C.

Memorandum Opinion of Appellate Division.

In the Matter of the Application of THE BERWIND-WHITE COAL MINING COMPANY, Petitioner, for an Order against JOSEPH D. MCGOLDRICK, as Comptroller of the City of New York, Respondent.—Determination of the comptroller that the petitioner The Berwind-White Coal Mining Company is liable for a sales tax deficiency unanimously annulled, with fifty dollars costs and disbursements to the petitioner, on the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208); *Matter of Compagnie Générale Transatlantique* v. *McGoldrick* (279 id. 192). The comptroller is directed to make refund to petitioner of the tax and penalties paid, with interest thereon from the date of payment. Settle order on notice. Present—MARTIN, P.J., GLENNON, UNTERMYER, DORE and CALLAHAN, JJ.

[255 App. Div. 961]

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